

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:1:LI:POSTF-168532-01

PARiegger

date: MAY 17 2002

to: Brooklyn Appeals
Attention: Appeals Officer Bernard Sarver

from: Associate Area Counsel
(Small Business/Self-Employed: Area 1)

subject:

Trust Fund Recovery Penalty

This is in response to your request for advice received December 19, 2001 and supplemental information received February, 2002 and April, 2002. This memorandum supersedes our memorandum dated April 18, 2002 and should not be cited as precedent. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

You wanted to know whether the abatement of the trust fund recovery penalty against the above taxpayers was a clerical error such that the erroneous abatement could be reassessed after the expiration of the assessment statute of limitations. For the reasons set forth below, we concur with your conclusion that the abatement did not stem from a substantive reconsideration of the taxpayers' liability as responsible persons. (b)(7)a. (b)(5)(AWP)

Facts:

The facts as we understand them are as follows. Letter 1153, dated [REDACTED] was sent to the above two taxpayers ([REDACTED] and [REDACTED]) informing them that they were determined to be responsible officers of [REDACTED] under I.R.C. § 6672. No response was received within sixty days and the trust fund recovery penalty (TFRP) was properly assessed against [REDACTED] and [REDACTED] on [REDACTED]. The TFRP was also assessed against a

third person determined to be a responsible person, [REDACTED]. However, [REDACTED] did not receive a Letter 1153 dated [REDACTED]. [REDACTED] received an undated letter. [REDACTED]'s attorney argued that [REDACTED] had no way to tell when the sixty day period commenced, therefore the revenue officer issued a second Letter 1153 to [REDACTED] this one dated [REDACTED].

A protest was mailed on [REDACTED] for all three taxpayers. On [REDACTED], the revenue officer prepared separate Forms 3870, Request for Adjustment, requesting abatement of the TFRP for all three responsible persons, [REDACTED], [REDACTED], and [REDACTED]. For all three taxpayers, the reason stated under "Reason for Adjustment," was "TP filed a protest on [REDACTED], rec'd in mail room [REDACTED]. Protest is consider timely, per Mike Sedita, SPf, abate TF assessment until after Appeal has made a determination." It was later determined by the Appeals Officer that the protest was timely for [REDACTED], but not for [REDACTED] and [REDACTED]. According to the appeals officer, no statute extension was secured for [REDACTED] or [REDACTED]. No facts have been provided to indicate that the revenue officer made a substantive determination that either [REDACTED] or [REDACTED] was not a responsible person.

Issues:

1. Whether an effective tax abatement of [REDACTED] and [REDACTED]'s assessments was made.
2. Whether the abatement of the TFRP against [REDACTED] and [REDACTED] was an administrative error, permitting the assessment to be reinstated after the expiration of the assessment statute of limitations.

Discussion:

Under section 6672, "the IRS has a duty to collect and retain from certain corporate officers and employees those funds that their corporation has unlawfully failed to turn over to the government." Matter of Bugge, 99 F.3d 740 (5th Cir. 1996) (citations omitted). To be held liable under section 6672, a person must be determined to be responsible under the meaning of the statute and to have wilfully failed to remit the amounts due to the government. Id.

Under certain situations set forth under I.R.C. § 6404, the Service may abate the unpaid portion of an assessment that is (1) excessive in amount; (2) assessed after the expiration of the applicable period of limitations; or (3) erroneously or illegally assessed.

In this case, there is no indication in the information provided that the revenue officer requested the abatements because the tax was determined to be excessive, nor because the statute of limitations had expired prior to the assessment. Abatements due to excessive taxes would require determinations by the revenue officer that [REDACTED] and [REDACTED] were not liable as responsible persons. There is no indication in the documents provided to us that the revenue officer made such a determination for either responsible person. Thus, there were no effective tax abatements under I.R.C. § 6404(a)(1): Matter of Bugge at 745.¹ The assessment statute of limitations was open when the assessments were made. Thus, there were no effective tax abatements under I.R.C. § 6404(a)(2).

It appears that the revenue officer requested the abatement because he believed that the protest received on [REDACTED] was timely. Thus, it appears that the revenue officer and the SPf Advisor from whom the revenue officer sought advice believed that the assessment was erroneously made because [REDACTED] and [REDACTED] were entitled to appeals consideration prior to being assessed. However, they were operating under a mistake of fact. The assessments were not erroneous, as required by I.R.C. § 6404(a)(3), because the protests filed by [REDACTED] and [REDACTED] were not timely. Rather, it was the abatements that were erroneous under the facts and the revenue officer's substantive determination of [REDACTED] and [REDACTED]'s liability.

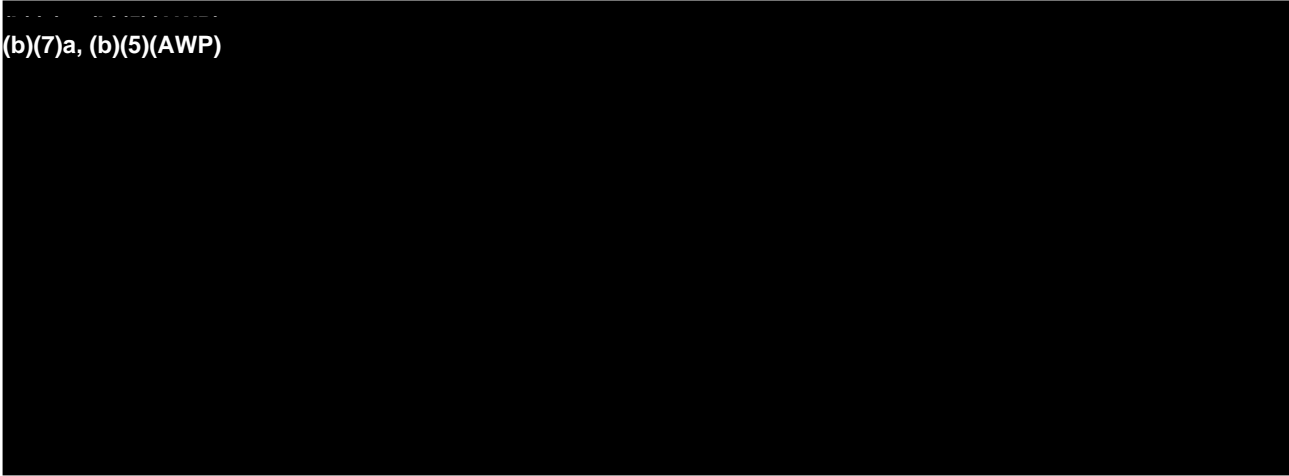
Further, "[a] distinction must be drawn between a substantive reconsideration of the taxpayer's liability by the IRS and a clerical error committed by the IRS that has the same effect. Whenever an abatement is issued because of a mistake of fact or bookkeeping error, the assessment can be reinstated, at least so long as this does not prejudice the taxpayer." Crompton-Richmond Co., Inc. 311 F. Supp. 1184, 1187 (S.D.N.Y. 1970).

Here, the Service did not request the abatements after a review of the assessments on the merits and after a reevaluation of the taxpayers' liabilities. Rather, the abatements were requested based upon mistakes of fact. The revenue officer mistakenly believed that the taxpayers were entitled to appeals consideration prior to assessment. The revenue officer did not

¹ We note that the Service, in the Internal Revenue Manual, continues to follow the reasoning in Crompton-Richmond Co., Inc. 311 F. Supp. 1184 (S.D.N.Y. 1970) because the reasoning in Bugge would be too far reaching especially if applied in erroneous refund cases. See TL-N-2628-98WLI#5, Significant Service Center Advice dated November 9, 2000.

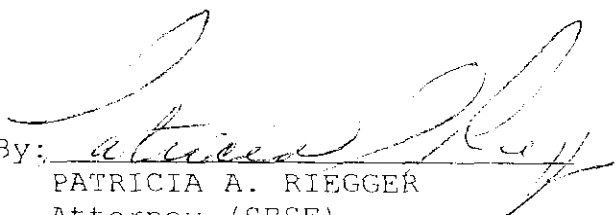
change his determination regarding the taxpayers' liability for the TFRP. Thus, there was no substantive reconsideration of the liability of either [REDACTED] or [REDACTED]. Rather the abatement, requested based upon a mistake of fact, constituted an administrative error. In addition, there would be no prejudice to the taxpayers because there was never a change in the Service's determination regarding the taxpayers' liability under section 6672. See Id.

(b)(7)a, (b)(5)(AWP)



If you have any questions, please call Patricia Riegger at (516) 688-1702.

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